U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 September 2006

Case No.: 2006-LDA-38

OWCP No.: 02-143261

IN THE MATTER OF

C. H.,
Claimant

vs.

SERVICE EMPLOYERS INTERNATIONAL,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

LEWIS S. FLEISHMAN, ESQ.,
On Behalf of the Claimant

JOHN L. SCHOUEST, ESQ.,
BRIAN E. WHITE, ESQ.,
On Behalf of the Employer/Carrier

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act),[1] brought by C.H. (Claimant) against Service Employers International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o AIG Worldsource (Carrier).[2]

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 11 Apr 06 a hearing was held at which the parties were afforded a full opportunity to call and cross-examine the Claimant, offer exhibits, make arguments, and submit post-hearing briefs. In its post-trial brief, Employer raised Section 8(f).

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant

Exhibits[4]
Claimant's Exhibits (CX) 1-18
Employer's Exhibits (EX) 1-21[5]
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

[1] 42 U.S.C. § 1651 *et. seq*. (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901 *et seq.*).
[2] For simplicity both Employer and Carrier are collectively referred to herein as Employer.
[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Both Claimant and Employer offered a chart summarizing Claimant's medical care. Claimant's chart was admitted as CX-17 and Employer's was admitted as EX-19. Both sides subsequently offered additional exhibits, but failed to allow for the charts in their numbering. Consequently, what was offered by Employer post-hearing as EX-19 (Dr. Miller deposition) and 20 (Scott & White records) should have been identified as EX-20 and 21 and will be referred to as such. Similarly, what was offered by Claimant post-hearing as CX-17 (the same Dr. Miller deposition) should have been identified as CX-18 and will be referred to as such. Offering exhibits that are duplicates of exhibits offered by opposing counsel does not help complete the record.
[5] EX-17 contained no documents.

STIPULATIONS[6]

1. Jurisdiction exists under the Defense Base Act.

2. Claimant suffered a heart attack at the time and place as generally alleged and there was an employee/employer relationship at the time of his heart attack.

3. Employer was properly notified of the alleged injury.

4. Notice of controversion was timely and properly filed.

5. Claimant has not reached maximum medical improvement (MMI) from his heart attack and is temporarily totally disabled as of the date of the formal hearing.

6. No medical benefits or disability compensation has been paid.

FACTUAL BACKGROUND

Claimant joined Employer in 2003 with a history of hypertension. He worked overseas for Employer until he suffered a heart attack in Afghanistan, was flown to Germany for medical care, and returned home. He has not worked in any capacity since then.

ISSUES

Causation/Coverage of Claimant's Heart Attack

Claimant argues that his work conditions in Afghanistan contributed to his heart attack and that he was in a zone of special danger out of which his heart attack arose. Employer responds that Claimant's heart attack was a disease of life unrelated to his work or presence in Afghanistan.

Nature and Extent of Disability

Claimant argues that he has never been able to return to his original job and in the absence of any evidence of suitable alternative employment, remains totally disabled. He also argues that he has not reached MMI and his disability is temporary in nature. Employer responds that Claimant reached MMI and fully recovered from his heart attack in Afghanistan on or before 6 Jan 06 for the purposes of returning to his original job.

[6] JX-1; Tr. 6-9.

Employer argues that any residual disability was unrelated to his heart attack, but due to a separate and discrete cardiac problem.

Medical Treatment

Employer argues that since Claimant's heart attack was unrelated to his work or presence in Afghanistan it is not responsible for any medical care. Claimant seeks an order requiring Employer to reimburse expenses for medication and treatment authorized under Section 7, including costs covered by other insurers, and interest.

Average Weekly Wage

Both Claimant and Employer agree that Section 10(c) should be used in determining Claimant's average weekly wage (AWW), but disagree on how the calculation should be made.

LAW

Disability Compensation

While the Act is normally construed liberally in favor of the claimant,[7] the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[8] which specifies that the proponent of a rule or position has the burden of proof and thus the burden of persuasion.[9]

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[10] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[11] The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident that could have caused the harm occurred.[12]

[7] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[8] 5 U.S.C. § 556(d).
[9] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[10] 33 U.S.C. § 902(2).
[11] 33 U.S.C. § 920(a).
[12] *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain.[13] These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.[14]

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that a claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.[15] "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.[16] Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).[17]

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.[18] If an administrative law judge (ALJ) finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.[19] The presumption does not apply, however, to the issue of whether a physical harm or injury occurred[20] and does not aid the claimant in establishing the nature and extent of disability.[21] Section 20(a) does not provide a presumption of compensability or injury.[22] A claimant still must establish the existence of an injury.[23]

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[13] *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990) (emphasis added).

[14] *Id.*

[15] *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

[16] *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier,* 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

[17] *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

[18] *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

[19] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994).

[20] *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

[21] *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

[22] *Devine*, 25 BRBS at 19-20.

[23] *Id*.

When aggravation of or contribution to a preexisting condition is alleged, the presumption still applies, and in order to rebut it, an employer must establish that the claimant's work events neither directly caused the injury nor aggravated the preexisting condition resulting in injury or pain.[24] A statutory employer is liable for consequences of a work-related injury which aggravates a preexisting condition.[25] Although a pre-existing condition does not constitute an injury, aggravation of a preexisting condition does.[26] Generally speaking, employers accept their employees with the frailties which may predispose them to bodily injury.[27]

Under the Defense Base Act, the injury need not be within the space and time boundaries of work if the employee was in a "zone of special danger." The test is whether "the employee had become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." [28] The test follows the humanitarian nature of the Act and is consistent with the Section 20(a) presumption.[29]

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner.[30] Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.[31] However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinions of the treating doctor.[32] A claimant's history of lying may be relevant to claimant's trustworthiness as a witness[33] or if in diagnosing the claimant's condition, doctors relied on what the claimant told them.[34]

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[24] *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).
[25] *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Fulks v. Avondale Shipyards, Inc.,* 637 F.2d 1008, 1012 (5th Cir. 1981).
[40] *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982).
[27] *Britton*, 377 F.2d at 147-148.
[28] *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951).
[29] *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.* 380 U.S. 359 (1965).
[30] *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).
[31] *Downs v. Director, OWCP*, 152 F.3d 924, (9th Cir. 1998); *see also Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000) (Social Security administrative law decision).
[32] *Duhagan v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997).
[33] *Cf.* F.R.E. 608(b).
[34] *Houghton v. Marcom, Inc.*, BRB Nos. 99-0809 and 99-1315 (April 25, 2000) (unpublished).

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[35] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[36] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[37] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[38] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[39] Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature.[40]

The question of extent of disability is an economic as well as a medical concept.[41] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[42]

Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act. To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.[43] If the claimant makes this *prima*

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[35] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).
[36] 33 U.S.C. § 902(10).
[37] *Sproull*, 25 BRBS at 110.
[38] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services*, 86 F.3d at 444.
[39] *Trask*, 17 BRBS at 60.
[40] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[41] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[42] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[43] *Elliot,* 16 BRBS 89.

facie showing, the burden shifts to employer to show suitable alternative employment.[44] The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.[45]

Medical Care

Section 7(a) of the Act requires employers to provide reasonable and necessary medical care.[46] A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[47] Interest accrues on medical expenses.[48]

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[49] which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[50]

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.[51] Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.[52] But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then Section 10(c) is appropriate.[53] Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

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[44] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).
[45] *Palombo v. Director, OWCP*, 937 F.2d 70, 75 (2d Cir. 1991).
[46] 33 U.S.C. §907(a).
[47] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-8 (1984).
[48] *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 76 (1997).
[49] 33 U.S.C. § 910(a)-(c).
[50] *SGS Control Services v. Director, Office of Worker's Compnsation [Barrios],* 86 F.3d 438, 441 (5th Cir. 1996).; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).
[51] 33 U.S.C. § 910(a).
[52] 33 U.S.C. § 910(b).
[53] *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[54]

The ALJ has broad discretion in determining annual earning capacity under subsection 10(c).[55] The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[56] Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[57] In calculating annual earning capacity under subsection 10(c), the ALJ may consider: the actual earnings of the claimant at the time of injury,[58] the earnings of other employees of the same or similar class of employment,[59] claimant's earning capacity over a period of years prior to the injury,[60] multiply claimant's wage rate by a time variable,[61] all other sources of income,[62] overtime,[63] vacation and holiday pay,[64]

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[54] 33 U.S.C. § 910(c).
[55] *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981).
[56] *See Barber*, 3 BRBS 244.
[57] *Gatlin*, 935 F.2d at 822.
[58] 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds,* 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.,* 21 BRBS 339, 344-45 (1988).
[59] 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.
[60] *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).
[61] *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.,* 12 BRBS 283, 287 (1980) (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).
[62] *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).
[63] *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).
[64] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).

probable future earnings of claimant,[65] or any fair and reasonable representation of the claimant's wage-earning capacity.[66]

Under subsection 10(c), the ALJ must arrive at a figure which approximates an entire year of work (the average annual earnings).[67]

Section 8(f) Relief

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim.[68]

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a preexisting permanent partial disability; (2) the preexisting disability was manifest to the employer; and (3) the current disability is not due solely to the employment injury.[69]

EVIDENCE

Claimant testified at trial in pertinent part that:[70]

> He was born in 1953 and lives in College Station, Texas. Following high school he worked for Trinity Industries for 30 years. He started as a helper in 1973 and two months later he started operating machinery. Then he worked his way up to being a coordinator. He had to do physical work the entire time he worked for Trinity. He had to set up the dyes for Trinity's five presses for forged steel. Trinity made grader blades for the front of tractors and forged steel into different applications.
>
> The machinery was in an open ended building that tractors and forklifts could run through. He worked with pretty hot steel. He mostly wore a cotton uniform. He could either rent a uniform consisting of a cotton shirt and pants or he could wear jeans and a shirt. He did not have to weak a jacket or coat, unless the weather

[65] *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).
[66] *See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).
[67] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).
[68] *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).
[69] 33 U.S.C. § 908(f); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied,* 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), *rev'g* 4 BRBS 23 (1976); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988).
[70] Tr. 31-85.

required. The temperature in the building varied with the temperature outside. Sometimes it if was 90 degrees outside, it would be 95 or 98 inside. The building had no air-conditioning or heating, but had cooling fans. He worked in and out of the building for 30 years.

During the last few years with Trinity he also worked part-time doing some construction. He installed hardwood flooring and generally worked as a helper. Most buildings had air conditioning and heat, but some did not.

About a year and a half before retiring from Trinity, Claimant started treating with Dr. Biles, his primary care doctor, for hypertension.

In May 2003, Claimant decided to retire from Trinity and applied for work with Employer. He took a pre-employment physical and disclosed his hypertension. He passed his physical and began to work for Employer in Afghanistan around 4 Jun 03. He worked for Employer until 31 Jul 05.

His initial base pay was $2,583.00 a month. He also got some overtime, a Foreign Service bonus, an area differential, and danger pay. He had a big lump sum addition to his pay in July 2005, because of a dispute with Employer. He believed he had been essentially been working as a foreman for about 15 months and asked Employer to adjust his back pay accordingly. Eventually they agreed to give him six months of back pay for the difference in pay for a foreman.

In July 2005, he drove forklifts, loaded trucks, and did paperwork. There were about 400 freezers stacked in groups outside and not in a climate controlled environment. He had to physically go into the freezers, find the product, get it out of the freezer, stack it up on a cart, cover it in plastic, and tie it down. Then he loaded the freezer and got back on the forklift. He was also responsible for handling thirty local workers. He had to walk in and out of the freezer, into the outside heat during his twelve hour shift.

His normal work schedule was seven days a week, 12 hours a day. However he also worked overtime. When he changed shifts, he would work overtime to get on cycle for the new shift. For example, if his current shift ended at 12:00, but his new shift ended at 4:00, he would work an extra four hours. This disrupted his sleep patterns and happened near the time of his heart attack.

He lived at Bagram Air Base, which is at 5,800 above sea level and surrounded by the world's largest minefield. They were constantly clearing mines, but missed some. He walked over a few mines. One time he drove over a mine and an Army vehicle got blown up right after him. He heard gunfire, bombs, and missiles and worried about being hit.

Afghanistan was very hot and dusty. It got up to 130 degrees and stayed consistently above 100. The dust and sand were everywhere and he had to wear clear glasses and a face mask. It was hard to breathe because of the elevation and he would get dehydrated. He worried about getting tuberculosis or hepatitis from the local workers, but could not avoid working with them.

He lived in a B-hut built out of a little plywood. There were ten men to an area and each had a personal space of about 7 by 10 feet. The spaces were divided by sheets of plywood. It was hard to sleep because the shifts did not match and people were coming and going at different hours.

On 31 Jul 05, he was showering before his shift. He had recently done four hours of overtime to make a shift change. All of a sudden, his chest tightened up and both of his arms locked up. He was taken to the Army Hospital at Bagram and then airlifted to a military hospital in Germany. In Germany, they found one of his vessels was 95% closed and put in a stent. He flew home on a commercial flight and arrived back in Texas on about 10 Aug 05.

Dr. Biles advised him to see a cardiologist and he went to see Dr. Miller. Neither doctor changed the medication prescribed by the doctors in Germany.

Employer has not paid for medical care or expenses since he returned from Afghanistan. He has COBRA, but has to pay the supplement out of his own pocket.

No doctor has released him to return to any form of work since July 31, 2005, but if he were physically able to work he would. He wants treatment so he could do some form of work in the near future.

Claimant testified at deposition in pertinent part that:[71]

He is about 6 feet tall and weighed between 210 and 215 when he was in Afghanistan. He was a mild smoker - perhaps two cigarettes a day up through his time in Afghanistan. The last time he smoked was before his heart attack.

During the summer, the temperature inside the Trinity tin building was about 10 or 15 degrees higher than outside and the outside temperature could be 100 degrees or more. There were times that he worked 10 or 12 hours a day under stress, but at the end he was working 8 hour shifts.

[71] EX-15.

When Dr. Biles started treating Claimant for hypertension, he warned Claimant that he had to take his medication or he would be at risk of stroke or heart attack. He also advised Claimant to exercise. Claimant tried to exercise in Afghanistan, but it was hard with 12 hour shifts.

His compensation from Employer was his base salary plus 25% area differential, 25% danger, and 5% Foreign Service bonus pay. He earned about $6,000 per month.

Being around the mines at Bagram made him nervous and depressed and his heart would race. The week before his heart attack he felt worn down.

If he walks for 25 minutes he gets very tired. He cannot drive well because he gets dizzy. He cannot lift much nor do anything that is strenuous. He cannot do yard work, but can carry groceries into his house. He currently takes 9 medications.

Charles Dusha testified at deposition in another matter in pertinent part to this case that:[72]

He was a paramedic for Employer at Bagram Air Base from September 2004 to November 2004. The base is located in the biggest mine field in the world and sits on the outskirts of the village of Bagram. At Bagram, the period from May to September is very hot, dusty, windy, and dry. The dust is very fine and dries out sinuses and mucosa. The elevation, dry climate, and dust combined to lead to dehydration.

There were between 1,000 and 1,500 local workers at Bagram. They were tested for TB and hepatitis.

Medical facilities at Bagram are limited.

Dr. Russell Biles testified at deposition and his records reveal in pertinent part that:[73]

He was Claimant's family physician before Claimant went to Afghanistan. He treated Claimant for hypertension, which is a risk factor for heart attack. Claimant had a history of smoking, which is another risk factor. Dr. Biles also treated Claimant after he returned from Afghanistan.

[72] CX-11.
[73] CX-12.

Before leaving for Afghanistan, Claimant had hypertension and was on medications to keep his blood pressure down. The medications had lowered his blood pressure to the mildly hypertensive range.

He believes that the stress of working irregular shifts and long hours, worrying about his safety, being in the heat, and living at the high elevation could have increased Claimant's stress level and blood pressure, aggravating his preexisting hypertension.

It is possible that Claimant's heart attack was caused by a small preexisting tear in a cardiac artery that led to a thrombosis. If that was the case, the increased workload and stress of being in Afghanistan may have contributed to his heart attack. It is probable that Claimant had coronary artery disease before he went to Afghanistan.

If he did not have the high blood pressure, he would not be at as great a risk, even given his previous heart attack.

He has continued to treat Claimant as his primary care provider, but Claimant has treated primarily with Dr. Miller for cardiac care.

He completed a form in September 2005 that indicated Claimant would be able to return to some light work by the next February and regular work in April 2006.[74] However, those dates were just estimates. By "regular work" he did not mean Claimant could return to his original job in Afghanistan. Claimant should never return to Afghanistan because of his risk of heart disease.

As of the deposition in March 2006, Dr. Biles was unaware that Claimant had been released to return to any type of work. Since he has not examined Claimant in four months, he did not know if Claimant reached MMI or could return to sedentary work. A job with a lot of physical activity, like lifting steel planks or welding, would probably be too much. Typically someone who has had an event such as Claimant's can return to mild to moderate labor and it is possible for them to actually become more fit than they were before. Exercise and diet are important.

Claimant should be in a place where he can monitor his blood pressure and will need to take medications to control his blood pressure for the rest of his life. Some medications would be required to treat his preexisting condition and some would be required to address his history of heart attack. However, many have a dual purpose. Although Claimant was on metoprolol for blood pressure control

[74] CX-12, deposition exhibit 6.

before the heart attack, it is also a standard medication to prescribe after a heart attack. The Lisinopril, Plavix, and Nifedipine are post heart attack medications. The hydralazine and terazosin are not.

Dr. Lane Miller testified at deposition and his records reveal in pertinent part that:[75]

He is a cardiologist and Claimant's treating physician for the purpose of his cardiac care.

He first saw Claimant on 15 Aug 05. Claimant brought his records from Afghanistan and Germany for review. Claimant described a history of hypertension with a myocardial infarction (MI) in Afghanistan, followed by a stent insertion in Germany. Claimant was on a number of medications prescribed for him in Germany. They included lipitoring and hypertensive therapies, along with Aspirin and Plavix. Claimant denied having chest pain or shortness of breath. Dr. Miller conducted a physical exam which indicated Claimant was stable, with a BP of 132/82. Claimant also had an EKG, which showed normal sinus rhythm and T-wave changes suggestive of coronary artery disease or recovering heart attack. He assessed coronary artery disease, hypertension, and hypercholesterolemia and ordered an echocardiogram.

The echocardiogram was performed on 18 Aug 05 and basically showed a normal heart with a mildly dilated atrium and mild leaking in the mitral valve.

Claimant returned for an office visit on 2 Sep 05 complaining of substernal chest tightness and non-radiating pain. He described the symptoms as totally different from those he experienced during his heart attack and denied any shortness of breath. Claimant's symptoms were not typical of pain associated with a cardiac cause and Dr. Miller ordered a stress test.

The stress test was performed on 26 Sep 05. Claimant did not achieve 85% of his maximum predicted heart rate, so the test was non-diagnostic. That may have been due to his medications. However, he went over 8 minutes with no pain and some shortness of breath. Dr. Miller concluded that Claimant had very good functional capacity at that time and he could resume a normal schedule, without any limitations.

On 21 Oct 05, Claimant presented to the emergency department at College Station Medical Center. He complained of a gradual onset of chest pain and increased blood pressure similar to, but less severe than what he felt when he had his heart attack. His BP was 161/118. Claimant had an EKG that showed normal sinus

[75]CX-18; EX-20.

rhythm without acute changes. Claimant was given nitroglycerin, which resolved the pain. He was admitted for overnight observation then released. The assessment was hypertension aggravated by acute stress over his wife's surgical complications. Once he was told her prognosis was good, his condition improved.

Dr. Miller saw Claimant two days later on 24 Oct 05. He planned to continue Claimant's treatment and see him again in 3 months.

On 28 Nov 05, Claimant was admitted to College Station Medical Center complaining of a headache, blurred vision, and elevated blood pressure. Claimant reported no chest pain, but that he had been non-compliant with the prescribed diet and medications. His BP was 140/120. Dr. Miller ordered an ECG and assessed Claimant as suffering from urgent hypertension, coronary artery disease, hyperlipidemia, and renal insufficiency.

Claimant returned to see Dr. Miller on 4 Jan 06. He reported one episode of chest pain that onset while he was laughing, but resolved over time. Claimant denied shortness of breath or exertional chest pain. He was able to walk up to two miles a day. Dr. Miller scheduled Claimant to return in four months.

Over the course of Claimant's treatment, his complaints have been inconsistent. On his last visit he indicated to Dr. Miler he was doing quite well and Dr. Miller believed has reached MMI. However, Claimant recently (within a day or two of the 27 Apr 06 deposition) called to complain of chest pain. Dr. Miller planned to do a nuclear stress test to determine the etiology of Claimant's recent complaints of chest pain and see if it is related to his heart.

Claimant's risk factors for a reoccurrence include his history of smoking and elevated LDL.

As of the date of deposition, Dr. Miller would restrict Claimant's activities until he underwent the nuclear stress test. A nuclear stress test is routine for people one year post myocardial infarction. The restriction would be a precaution based on Claimant's recent phone call complaining of chest pain. If the stress test indicated a problem, Claimant would need to undergo a cardio catheterization to assess not only his stinted artery, but other vessels. It is absolutely possible that Claimant's chest pain originates in an area not involved in his heart attack in Afghanistan. That could lead to the insertion of another stent.

Claimant should be on a number of medications as a result of his hypertension and the aftermath of his myocardial infarction. He should also be monitoring his blood pressure twice daily. Claimant should not be in an environment of limited medical care, working hours in excess of 12 hours per day and 7 days per week, or harsh conditions.

It is possible that the conditions at Bagram combined with Claimant's preexisting hypertension hastened or resulted in his myocardial infarction. Increased heat, elevation, and dehydration could play a part in a myocardial infarction. Disrupted sleep patterns could increase stress and raise blood pressure.

He reviewed Dr. Biles' deposition and disagreed with him that working stress played a part in the cardiac environment.

Claimant had three cardiac risk factors: smoking, elevated cholesterol, and family history of heart disease. Working in a hot warehouse in Texas could also have increased Claimant's risk. Claimant was at an increased risk regardless of his location.

Scott and White Clinic records reveal in pertinent part that:[76]

Claimant was diagnosed with hypertension in February 2001 and continued to be followed for it. He saw Dr. Biles in May 2003, just before leaving for Afghanistan and was given a prescription for an increased dosage of Aatenolol to take with him. He saw Dr. Biles again in October 2003, during a visit home and reported no problems. He was continued on the same dosage of Atenolol. He returned to Dr. Biles in February 2004 and reported he had switched from Atenolol to Metoprolol. Dr. Biles switched him back to Atenolol. He returned to the clinic in July 2004 with no complaints, but was given Dyazide to add to the Atenolol. Claimant was seen again on 16 Jul 05, to refill his prescription before returning to Afghanistan. He was placed on Atenolol and Hydrochlorothiazide. The diagnosis was poorly controlled hypertension.

On 14 Sep 2005 Claimant returned and reported his recent history of myocardial infarction. Dr. Bile's assessment and plan was: coronary artery disease to be treated by Zocor, Aspirin, and Plavix; hypertension to be treated with Nifedipine, Metoprolol and Terazosin; and Hyperlipidmedia to be treated with Zocor. Claimant was to see a cardiologist and return in 3 months.

[76]EX-21.

Landstuhl Medical Center records for Claimant reveal in pertinent part that:[77]

> A cardiac catheterization performed on 2 Aug 06 indicated severe thrombosis of the mid circumflex artery. Two stents were placed in his mid circumflex artery with good results, but some residual stenosis. The diagnosis was post hypertensive emergency and coronary artery disease post acute inferior ST segment elevation myocardial infarction related to acute plaque rupture.

Employer's answers to interrogatories state in pertinent part that:[78]

> As of 24 Mar 2006, Claimant had not reached MMI. Claimant's earnings for the 52 weeks immediately preceding his heart attack were $73,892.37.

Claimant's contract with Employer states in pertinent part:[79]

> Claimant was hired by Employer effective 4 Jun 03 as a warehouseman. His monthly pay was $2,583.00, plus 55% in Foreign Service, area differential, and danger pay. There was no minimum contract term, although the duration was anticipated to be 12 months.

Claimant's personnel records reveal in pertinent part that:[80]

> Claimant's starting monthly compensation was $2,583.00, plus $129.15 in Foreign Service pay, $645.75 in area differential pay, and $645.75 in danger pay, for a total of $4,003.65. With overtime of $2,816.46, the monthly compensation totaled $6,820.11. He started on 4 Jun 03 as a warehouseman.
>
> In May 2005, a temporary retroactive job change was approved. Claimant's status was changed from warehouseman to warehouse foreman for 13 Jun 04 through 14 Nov 04. He was paid one lump sum to reflect an increase in base pay from $2,583.00 to $3,057.00 for that period.

ANALYSIS

Coverage/Causation

There is no dispute that before taking a job with Employer, Claimant suffered from preexisting hypertension and carried a number of risk factors for a myocardial

[77]EX-7.
[78]CX-3.
[79]CX-6; EX-1.
[80]EX-2.

infarction. Similarly, there is no dispute concerning the conditions of Claimant's work for Employer or his exposure to general adverse environmental factors as he lived in Afghanistan. The dispute is the role those played in his 31 Jul 05 myocardial infarction.

Although the treating doctors did not totally distinguish the impact of Claimant's actual work from the totality of living in Afghanistan, Dr. Biles' opined that Claimant's MI was related to his work. That is sufficient to invoke the Section 20(a) presumption. Dr. Miller's disagreement with that assessment, when combined with the preexisting hypertension and other risk factors, is sufficient evidence to rebut the presumption. Nevertheless, I find that the totality of the evidence shows that it is more likely than not that Claimant's working conditions (as opposed to general environmental conditions in Afghanistan) combined with his preexisting conditions to hasten, aggravate, or cause his MI.

Moreover, even if the conditions related specifically to Claimant's work did not lead to the MI and his injury was not within specific boundaries of his work, I find that the record establishes that Claimant's stressful living conditions in Afghanistan constituted a zone of special danger that more likely than not combined with his preexisting conditions to hasten, aggravate, or cause his MI. Such a finding is consistent with the opinions of both treating physicians and the evidence of the living environment in Afghanistan.

Consequently, I find that Claimant's MI was related to both his actual work and, in the alternative, his presence in a zone of special danger.[81]

Nature and Extent of Disability

At the hearing, the parties stipulated that as of that date (11 Apr 06), Claimant was temporarily total disabled since his 31 Jul 05 MI. Based on a post hearing deposition by Dr. Miller, Employer seeks to withdraw from that stipulation. It now argues that at least as of January 2006, Claimant had reached MMI as to his MI and suffered no residual disability.

Since there was no evidence of suitable alternative employment offered, Claimant is presumed totally disabled unless the record establishes he could return to his original job with Employer. Dr. Biles believes that because of the risk of heart disease, Claimant should not return to that job.

[81] Employer's argument that Claimant could have been subject to similar stresses had he remained at work in the hot metal building at Trinity does not make it a disease of life and misses the real point. The issue is whether the job with Employer led to an injury, not whether staying in a previous job could have led to a similar injury.

Dr. Miller's opinion is not as clear. Following the 26 Sep 05 stress test, Dr. Miller felt that Claimant could return to a normal schedule without any limitations. Dr. Miller's last visit with Claimant was on 4 Jan 06 and Dr. Miller believed Claimant had reached MMI. On the other hand, Dr. Miller testified that shortly prior to his deposition, Claimant began complaining of chest pain. Because of that, Dr. Miller believes a nuclear stress test is necessary before a full and current assessment is possible. Dr. Miller agreed with counsel's suggestion that Claimant should work 40 hour weeks closer to home, rather than in a foreign war zone working 12 hours a day, 7 days a week.

However, Dr. Miller's testimony was not dispositive as to whether the need for a nuclear stress test and Claimant's restrictions are due to his hypertension, a new cardiac problem unrelated to the MI, or a natural result of his MI. While he stated that the new chest pain complaints could absolutely be unrelated to Claimant's MI and the stress test was a precautionary measure based on Claimant's recent complaint, he also stated that a nuclear stress test is routinely done one year post MI and stent insertion.

Given that the stress test is a routine protocol one year post MI/stent insertion and that Dr. Miller does not want Claimant to return to work until it is done and he can assess its results, I find that the preponderance of the evidence shows that Claimant has not reached MMI and remains temporarily totally disabled.[82]

Medical Care

Claimant suffered from and was being treated for hypertension before going to Afghanistan. His living and job conditions in Afghanistan, combined with his hypertension, led to his MI. While his MI may have resulted in aggravated coronary artery disease, the record does not show that it aggravated the extent of the underlying hypertension.

Accordingly, I find that any post MI treatment or medications solely for Claimant's hypertension or hypercholesterolemia are not related to his injury which resulted from his employment or presence in a zone of special danger. On the other hand, any post MI treatment or medications, which in whole or in part are for coronary disease related to the vessels which were involved in or received stents because of Claimant's MI

[82] While the stipulation was a factor, it was not dispositive. Had the record clearly indicated the stipulation was erroneous, I would have refused to accept it. Stipulations are designed to help the parties focus on the real issues in a case and withdrawing from a stipulation after the fact deprives the opponent of the opportunity to fully litigate the stipulated issue. In this case, Claimant did not know MMI was an issue until receiving Employer's post hearing brief.

in Afghanistan are covered. That specifically includes all treatment thus far provided to Claimant and recommended by Dr. Miller, except those medicines which are exclusively for the treatment of hypertension/hypercholesterolemia and which would have been prescribed even in the absence of an MI.

Average Weekly Wage

Claimant worked in the same employment for the entire year immediately preceding the injury and his AWW would normally be calculated under Section 10(a). However, in spite of what appears to be counsels' best efforts to discover and obtain Employer's data regarding Claimant's work and wage information, neither that nor any relevant Section 10(b) information was available for the record. Consequently, both parties agree that Section 10(c) should be applied. However, they disagree on the actual calculations.

Claimant suggests taking the monthly pay actually received from 1 Sep 04 through 31 Jul 05. That includes a $16,196.22 pay period in July 2005, which included the supplemental back pay for the disputed period during which Employer postdated a temporary job and wage change from warehouseman to warehouse foreman. Since dividing that sum ($86,984.56) by 52 yields an AWW of $1,672.78, and results in more than the maximum compensation rate, Claimant does not appear to address the fact that his approach does not account for wages earned in August 2004.

Employer objects to including the disputed foreman back pay and uses only pay from September 2004 through July 2005 ($73,892.00). It then apparently divided that amount by 52 to arrive at an AWW of $1,421.00. Employer does not explain why it divides 11 months of wages by 52 weeks of work, but vaguely encourages the court to "reduce the remaining income to reasonably account for the temporary nature of the job assignment and any other relevant factor [it] deems relevant."[83] Apparently, an appropriate reduction in the actual annual wage happens to equal exactly what Claimant made in August 2004.

I do not find the job to be temporary in nature, as Claimant had been there for an extended period and there was no evidence in the record of an impending departure. Conversely, there was a decidedly temporary and uncertain nature as to Claimant's disputed pay as a foreman, and I decline to include it. Had Employer provided the appropriate documents, the calculation would have been made under Section 10(a). In the absence of that data, the fairest calculation of Claimant's income would be to first address Claimant's annual pay as a warehouseman in the 12 months prior to his injury. Since August 2004 is missing and July 2005 is unclear as to it what it includes,[84] I will

[83] Employer's Brief, p. 10.

[84] One printout includes the disputed back pay for July 2005 and the other printout shows an amount with a precipitous decrease, even though Claimant worked the entire month.

simply take the total pay for September 2004 through June 2005 ($73,892.37 – $3,104.03 = $70,788.34) and divide it by ten (10) to arrive at a monthly average wage of $7,078.83 and use that figure for August 2004 and July 2005.[85] Adding those two months yields an annual warehouseman wage of $84,946.01 ($70,788.34 + (2 x $7,078.83) = $84,946.01). Dividing that annual income by 52 yields an AWW of $1,633.57.

Section 8(f) Relief

In the absence of a finding of any permanent disability, the Section 8(f) issue is moot.

DECISION

1. Claimant suffered a compensable myocardial infarction on 31 Jul 05, while he was employed in Afghanistan.

2. Claimant is temporarily totally disabled from that date through the present and continuing.

3. Claimant's average weekly wage at the time of his work-related injury was $1,633.57.

ORDER

1. Employer shall pay Claimant compensation for temporary total disability from 31 Jul 05 through the present and continuing based on Claimant's average weekly wage of $1,633.57.

2. Employer shall pay all reasonable, appropriate, and necessary medical expenses arising from Claimant's 31 Jul 05 myocardial infarction, consistent with the above ruling and pursuant to the provisions of Section 7 of the Act.

3. Employer shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[86]

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[85] The pay record indicates a 13th pay period for the year that is of unclear origin. Nonetheless, it is identified as part of total pay for the period of September 2004 to July 2005.

[86] Effective 27 February 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.,* 16 BRBS 267 (1984) .

5. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

6. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[87] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

[87] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **20 Jan 06**, the date this matter was referred from the District Director.